

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

EMPLOYEE – **Appellant**

RP991/2009

against

WT384/2009

EMPLOYER -**Respondent**

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr. M. Noone
Ms. M. Finnerty

heard these appeals at Dublin on 9 February 2010

Representation:

Appellant:

Mr. Peter Leonard B.L. instructed by
Mr. Blazej Nowak, Polish Consultancy Enterprise,
19 Talbot Street, Dublin 1

Respondent:

Ms. Ciara O'Duffy B.L. instructed by
Ms. Sheila McConnell, Solicitor,
10 Meadow Court, Kilcullen, Co. Kildare

The determination of the Tribunal was as follows:

The respondent provides technical services to construction sites and the appellant was employed as a general assistant from January 2004. The appellant worked with a site engineer (SE) and their last job working together was on a school project in Wicklow (the project). The project came to an end on or about 24 October 2008 and this was the last time that the appellant worked for the respondent. SE, who is the appellant's brother-in-law, stopped working on sites after the project came to an end and since that time has been employed in an office based role. On 4 November 2008 the respondent issued protective notice to all of its approximately 70 employees, including the appellant.

On 26 March 2009, by registered post, the appellant served the respondent with form RP9 in which he claimed redundancy by reason of lay-off or short-time. Having received no counter notice to this

claim a form T1A was lodged with the Tribunal on 21 April 2009 and, in a response to the claim filed by way of the T2 and dated 30 June 2009, the respondent indicated willingness to meet the claim. By this time the work force had been reduced to some 50 employees.

The respondent's position before the Tribunal was that the appellant had interpreted the letter of 4 November 2008 as having laid him off and then worked away from the employment, despite having been offered alternative employment. The respondent's accountant denied having received the RP9 from the appellant and told the Tribunal that the T2 had been filed in error, as she believed it referred to a different employee who had become redundant. Further the appellant had been involved in assisting his wife in a business venture which was abandoned in February 2009 and this was the reason the appellant had lodged the redundancy claim.

The appellant sought payment of three days' pay in relation to three public holidays, which fell between his last working for the respondent and the time he lodged this appeal.

Determination:

It is common case that appellant last worked for the respondent when the project came to an end on or about 24 October 2008. No direct evidence was adduced to the Tribunal to show that the appellant was offered any work after that date. On this basis the Tribunal is satisfied that the appellant was laid off from 24 October 2008 that is before the protective notice was issued on 4 November 2008. When an employee is laid off there is nothing to prevent that employee from seeking alternative employment such as that involving his wife's business venture.

Section 12 of the Redundancy Payments Acts provides

An employee shall not be entitled to redundancy payment by reason of having been laid off or kept on short-time unless—

(a) he has been laid off or kept on short-time for four or more consecutive weeks or, within a period of thirteen weeks, for a series of six or more weeks of which not more than three were consecutive, and

(b) after the expiry of the relevant period of lay-off or short-time mentioned in paragraph (a) and not later than four weeks after the cessation of the lay-off or short-time, he gives to his employer notice (in this Part referred to as a notice of intention to claim) in writing of his intention to claim redundancy payment in respect of lay-off or short-time.

From 24 October 2008 the appellant was on lay-off. He lodged a claim for redundancy by reason of lay-off on 26 March 2009. The respondent did not issue counter notice. Accordingly the Tribunal finds that the appellant is entitled to a lump sum payment under the Redundancy Payments Acts, 1967 to 2007 based on the following criteria.

Date of Birth	22 April 1953
Employment commenced	17 January 2004
Employment ended	26 March 2009
Gross weekly pay	€581-00

There was a period of non-reckonable service by reason of lay-off from 24 October 2008 until 26 March 2009.

It was submitted on behalf of the appellant that he was entitled to receive pay for public holidays whilst on lay-off. Section 21 of the Organisation of Working Time Act, 1997 provides at sub-section (1)

Subject to the provisions of this section, an employee shall, in respect of a public holiday, be entitled to whichever one of the following his or her employer determines, namely—

- (a) a paid day off on that day,*
- (b) a paid day off within a month of that day,*
- (c) an additional day of annual leave,*
- (d) an additional day's pay:*

Provided that if the day on which the public holiday falls is a day on which the employee would, apart from this subsection, be entitled to a paid day off this subsection shall have effect as if paragraph (a) were omitted therefrom.

Sub-section (5) provides

Subsection (1) shall not apply, as respects a particular public holiday, to an employee who is, other than on the commencement of this section, absent from work immediately before that public holiday in any of the cases specified in the Third Schedule.

And the third schedule provides

ENTITLEMENT UNDER section 21 IN RESPECT OF PUBLIC HOLIDAYS:

EXCEPTIONS

Each of the following are the cases mentioned in section 21 (5) of absence by the employee concerned from work immediately before the relevant public holiday:

1. such an absence, in excess of 52 consecutive weeks, by reason of an injury sustained by the employee in an occupational accident (within the meaning of Chapter 10 of Part II of the Social Welfare (Consolidation) Act, 1993),

2. such an absence, in excess of 26 consecutive weeks, by reason of an injury sustained by the employee in any accident (not being an accident referred to in paragraph 1) or by reason of any

disease from which the employee suffers or suffered,

3. such an absence, in excess of 13 consecutive weeks, caused by any reason not referred to in paragraph 1 or 2 but being an absence authorised by the employer, including a lay-off,

4. such an absence by reason of a strike in the business or industry in which the employee is employed.

It is clear from paragraph 3 that absence from work by reason of the first thirteen weeks of lay-off does not disqualify an employee from payment for public holidays, which fall within that period.

The appellant was on lay-off from 24 October 2008 and the first thirteen weeks of lay-off ended on 23 January 2009. In that period there were four public holidays and the Tribunal awards €464-80, being four days' pay, under the Organisation Of Working Time Act, 1997

These awards are made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)